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In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,
Respondent,

vs.

ALPINE LAND AND RESERVOIR COMPANY, et al.,
Respondents,

PYRAMID LAKE PAIUTE TRIBE,
Applicant for Intervention-Petitioner.

Case No. 927

Brief of Respondents, E. P. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Jolaid Winters in Opposition to Petition for Writ of Certiorari.

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The respondents H. F. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Johnd Winters oppose the granting of a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit which denied intervention of the Pyramid Lake Paiute Tribe. The respondents are dissatisfied with the petitioner's statement of the questions presented for review and with the petitioner's statement of the case. They restate the questions and the case as follows:

STATEMENT OF THE QUESTIONS FOR REVIEW

1. Was the petitioner's motion to intervene timely filed?

2. Does the petitioner claim an "interest" in the subject of this action within the meaning of Rule 24(a) (2), Rules of Federal Procedure?

3. Assuming an "interest" arguendo, may the disposition of the action "impair or impede" the ability of the petitioner to protect that interest wthin the meaning of the rule?

SUPPLEMENTAL STATEMENT OF THE CASE

These respondents deem it necessary to correct inaccuracies and to supply omissions in the petitioner's statement of the case.

The statements regarding, (1) threatened destruction of Pyramid Lake, (Pet. Br. p. 3), (2) encroachments causing severe harm to the fishery, ecology and natural beauty of the lake, (Pet. Br. p. 4), (3) the current rate of diversion strangling the ecology of the lake, (Pet. Br. p. 4), (4) the effect of the Washoe Project on the lake, (Pet. Br. p. 5), and (5) the effect of the regulations of the Secretary of the Interior, (Pet. Br. p. 6), are not factual and are not in the record in this case. Such statements are not pertinent to the issues before this Court.

The petitioner's statement omits the important fact that the Carson River, the adjudication of the waters of

which are the subject of this litigation, and the Truckee River in which the petitioner claims water rights are two independent water sources each rising in the State of California and flowing eastwardly into Nevada. Neither is a tributary of the other, the only physical connection being a canal into which Truckee water is diverted at Derby Dam and carried to the Carson River. The dam and canal are features of the Newlands Reclamation Project. Because of the topography water cannot be diverted from the Carson River and carried to the Truckee River. As indicated in the sketch, Exhibit A to the opinion of the Court of Appeals, (Pet. Br. App. B.), the Truckee River flows into Pyramid Lake and the Carson River flows into the distant Carson Lake and Carson Sink.

The Newlands Reclamation Project was constructed by the Department of the Interior under the Reclamation Act of June 17, 1902, (32 Stat. 388). Investigation of the project began in 1902. It is alleged in the complaint that the Secretary of the Interior was then, (1925), completing the construction of the project. The project lands, located along the lower Carson River, are irrigated by diversions of water from the Carson River and also from the Truckee River. Water of the Truckee is carried in the Truckee Canal to Lahontan Reservoir, which is located in the Carson River drainage.

The rights to the use of Truckee River were adjudicated by the United States District Court for the District of Nevada in a case entitled United States v. Orr Water Ditch Company, by a decree dated, September 8, 1944, which contains detailed descriptions of many hundreds of water rights including claims of the United

States to Truckee River water for the benefit of the Tribe and for the Newlands Project as set out on pages 10 and 11 of the Truckee River Decree. The awards for the Tribe are designated "claim No. 1" and "Claim No. 2," have a priority of 1859 and are for the water required to irrigate a total of 17,487 acres of land on the Pyramid Lake Indian Reservation. Claims Nos. 3 and 4 cover appropriations by the United States at the Derby Dam with a priority of 1902, and at Lake Tahoe with a priority of 1903 for the Newlands Project.

Except for the United States and a very few others having water rights on each river, the parties to the Truckee River Decree are not parties to this suit, which involves only Carson River water rights, and Carson River water users are not parties to the Truckee River Decree.

The brief reference in the petitioner's statement of the case to the executive order of the Secretary of the Interior (Pet. Br. p. 6), does not adequately cover its contents. It provides "that certain designated officers in the Department of the Interior shall recommend on or before October 1, 1967, 'operating criteria and procedures' consistent with those set forth in the Regulations for the coordinated operation and control of the Truckee and Carson Rivers, '. . . in regard to the exercise of water rights of the United States, so as to (1) comply with all of the terms and provisions of the Truckee River Decree and the Carson River Decree; and (2) maximize the use of the flows of the Carson River in satisfaction of Truckee-Carson Irrigation District's water entitlements and minimize the diversions of flows of the Truckee River for District use in order to make

available to Pyramid Lake as much water as possible.'" 43 C.F.R. Sec. 418.

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Appeals does not conflict with this Court's construction of Rule 24(a).

2. The decision does not conflict with applicable decisions of other Courts of Appeal.

3. "Summary Reversal" is not appropriate.

4. There is no conflict with decisions of this Court or with decisions of other courts of appeal on the issue of timeliness.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S CONSTRUCTION OF RULE 24(a).

The petitioner contends that the decision of the Court of Appeals conflicts with the decision of this Court in the case of Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967). It is argued:

> "The posture of the Pyramid Lake Paiute Tribe in this litigation is closely analogous to that of Cascade. Both the Tribe and Cascade faced the prospect of a diversion to third parties of resources vital to them (here water, there gas) and both are concerned that any such diversion be made under circumstances which will not, as a practical matter, jeopardize their legitimate in-

> terests. In *Cascade*, moreover, the company was seeking intervention to protect a business relationship to which it had no pre-existing right. Here, the Tribe is attempting to protect a real property interest which, if lost, will mean the economic and cultural destruction of the Tribe." (Pet. Br. p. 11.)

The petitioner entirely misconstrues the intent and purpose of Rule 24(a) and the decision in *Cascade*. The rule requires a showing that the applicant ". . . claims an interest reating to the property or transaction which is the subject of the action. . . ." In *Cascade* this Court held that the subject of the action was the "competitive system" and this Court found that each applicant for intervention had an interest in such subject.

This case is clearly distinguishable from *Cascade*. The Court of Appeals properly pointed out that the Tribe has no water rights in the Carson River and that its claimed rights in the Truckee cannot be afffected by the decree adjudicating the water rights in the Carson.

II. THE DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF OTHER COURTS OF APPEAL.

The petitioner contends that the decision of the Court of Appeals in this case ". . . stands starkly by itself among decisions of the courts of appeal in narrowly limiting the permissible scope of intervention as of right." Four decisions of other circuits are cited to show a conflict. These will be briefly discussed.

Smuck v. Hobson, 408 F.2d 175 (C.A.D.C. 1969) invoved various policies of the board of education relating to segregation. Parents of children in the school sys-

tem sought to intervene, after judgment, to appeal the final judgment of the trial court against the board of education. The trial court had held that the Board of Education had, in a variety of ways, violated the Constitution in administering the District of Columbia Schools. The court of appeals permitted intervention under Rule 24(a) (2) holding that parents of school children have an "interest" in the education of their children and therefore an "interest" in the constitutionality of school administration. The "transaction" required by Rule 24(a) (2) which is the subject of the action is clearly identifiable as the school administration under attack. There was an "interest" in the subject of the suit which distinguishes the Smuck case from the case at bar.

In Nuesse v. Camp, 385 F.2d 694 (C.A.D.C. 1967) the court of appeals permitted a state banking commissioner to intervene in a case filed by a state bank for declaratory and injunctive relief against the United States Comptroller of the Currency alleging that the Comptroller was about to approve the opening of a competitive branch bank in the vicinity of the plaintiff's office. It said:

> "We hold that where protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention."

Here again this case is distinguishable from the instant case because there was an "interest" in the subject of the action.

Atlantis Development Corporation v. United States, 379 F.2d 818 (C.A. 5th Cir. 1967) was filed by the

United States against contractors engaged in erecting caissons on certain coral reefs of which Atlantis claimed ownership. Atlantis sought to intervene asserting its title and contending that the United States had no territorial jurisdiction, dominion or ownership of the reefs. The trial court denied intervention the court of appeals reversed, holding that Atlantis had the right to intervene under Rule 24(a) (2). The court said:

> "When approached in this light, we think that both from the terms of new Rule 24(a) and its adoption of 19(a) (2) (i) intervention of right is called for here. Of course F.R.Civ.P. 24(a) (2) requires both the existence of an interest which may be impaired as a practical matter and an absence of adequate representation of the intervenor's interest by existing parties. There can be no difficulty here about the lack of representation . . .
>
> "Nor can there be any doubt that Atlantis 'claims an interest relating to the property or transaction which is the subject of the action.' The object of the suit is to assert the sovereign's exclusive dominion and control over two out of a group of islands publicly claimed by Atlantis. This identity with the very property at stake in the main case and with the particular transaction therein involved (the right to build structures with or without permission of the Corps of Engineers) is of exceptional importance . . .

The distinction between the Atlantis Development Corporation case and the case at bar is obvious. In the Atlantis case the applicant for intervention claimed ownership of the subject of the litigation, the coral reefs, and in the present case the subject of the litigation is the water of the Carson River in which admittedly the Tribe has no right.

The case of Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97 (C.A. 2d Cir. 1970) does not involve intervention and is not in point on the facts or the law. The issuance of a permit for an expressway was the subject of the litigation and the village of Tarrytown, a co-plaintiff in the case, claimed an interest because the expressway would eventually pass through the village. There is no factual similarity with the present case and there are no legal principles applicable to both cases.

III. "SUMMARY REVERSAL" IS NOT APPROPRIATE.

The petitioner contends that "summary reversal is appropriate in view of the reasoning of the court below, the ambiguous position of the United States and its officials and the pendecy of related proceedings." (Pet. Br. p. 12.) It has failed to cite any rule of this Court, or any case authorizing the "summary reversal" of a case on petition for writ of certiorari and we have found no authority for such procedure. Under Supreme Court Rule 41 the parties are given time to prepare and file briefs on the merits which, we assume, must precede any decision on the merits of the case. Nevertheless we will comment on the points argued under the "summary reversal" heading.

The "reasoning" referred to above is apparently the following on pages 7 and 8 of appendix B:

> "The pending suit is to quiet title to water rights of the parties to the within action in only Carson River waters. The Tribe has no interest in the subject of this suit and its water rights to the Truckee River are not involved.

"The Tribe may have water rights in the Truckee other than its rights to irrigation water from the Truckee, as determined by the Court in *United States vs. Orr Water Ditch Co.*, supra, under the principle announced in Winters Doctrine, *Winters vs. United States*, 207 U.S. 564 (1908).

"In *Arizona vs. California*, 373 U.S. 546, 600 (1962), the Supreme Court states:

> 'The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act.
>
> 'We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.'

"The Tribe contends that the Winters Doctrine has been expanded, citing *Alaska Pacific Fisheries vs. United States*, 248 U.S. 78, 89 (1918) (fishing rights); and *Arizona vs. California*, supra.

"If The Tribe has water rights in the Truckee not vested by the Decree in the *Orr Water Ditch Co.* case, supra, they may not properly be asserted or adjudicated in the within litigation. The issues

> of any possible additional rights of The Tribe to the waters of the Truckee are not before this Court and we make no determination thereof."

The foregoing quotation is under the heading, "The Tribe is without interest in the Carson River Waters." It is properly pointed out by the Court of Appeals that the Tribe's water rights whether for irrigation or for other uses under the Winters Doctrine are in the Truckee River and are not involved in the present suit for adjudication of Carson River water rights. No other conclusion could have been reached. Every user of water on the Truckee River is a necessary party to any petition or suit to open the 1944 decree in the case of United States v. Orr Water Ditch. It is settled law that the only proper method of adjudicating water rights on a stream is to have all appropriators who use water from the stream involved in court at the same time. *People of the State of California v. United States*, 235 F.2d 647 (C.A. 9th Cir. 1956.) 2 Wiel, Water Rights, 3rd Ed. pp., 1125, 1126; *Campbell v. Wyoming Development Co.*, 55 Wyo. 347, 100 P.2d 124 (1940); *Allen v. California Water Co.*, 31 Cal. 2d 104, 187 P.2d 393 (1947). The issues in a suit for the general adjudication of water rights, such as United States v. Orr Water Ditch, are the rights of the water claimants against each other. Brooks v. United States, 119 F.2d 636 (C.A. 9th Cir. 1941).

It is the petitioner's suggestion on page 16 of its petition:

> "If the government disagrees with the reasoning underlying the Ninth Circuit's opinion, it should say so and cease its opposition to the Tribe's intervention. If it is in agreement, and will enter into a stipulation to the effect that the Newlands

> Project rights to Truckee River water are necessarily junior to the adjudicated and unadjudicated rights of the Pyramid Lake Paiute Tribe, the Tribe will withdraw its petition for intervention in this proceeding."

The suggestion is without merit because not only is the government, as only one party, interested in the priority of the petitioner's claimed right to Truckee River water, but there are several hundred others (not parties to this suit) who are interested in such right and entitled to a hearing on the issue of not only the priority, but also of the extent and nature of the right claimed under the Winters Doctrine. Any such stipulation would obviously be wholly ineffectual and has nothing to do with the adjudication of water rights on the Carson River which is the subject of this action.

IV. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER COURTS OF APPEAL ON THE ISSUE OF TIMELINESS.

Under the heading, "Timeliness is not a bar to the Tribe's Intervention," the petitioner argues the merits of the point which would be briefed if certiorari should be granted. No reasons for granting the writ such as those mentioned in Supreme Court Rule 19 are given. No conflict with any decision of this Court, or with a decision of another Court of Appeals with respect to timeliness is mentioned by the petitioner. Nor has the petitioner argued that the Court of Appeals ". . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." The question of timeli-

ness was committed to the discretion of the trial court. It was ruled upon in the accepted and usual course of judicial proceedings.

CONCLUSION

The petitioner having failed to give any special or important reasons for granting the petition for writ of certiorari and having failed to establish that the decision of the Court of Appeals conflicts with applicable decisions of this Court or with decisions of other Court of Appeal, the petition should be denied.

Respectfully Submitted,

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PROOF OF SERVICE

I, E. J. Skeen, attorney of record for Respondents H. F. Dangberg Land and Livestock Company, Sierra Pacific Power Company, Fred Dressler and Johnd Winters herein, depose and say that on the 30th day of November, 1970, I served a copy of the foregoing

BRIEF OF RESPONDENTS, H. F. DANGBERG LAND AND LIVESTOCK COMPANY, SIERRA PACIFIC POWER COMPANY, FRED DRESSLER and JOHND WINTERS IN OPPOSITION TO

by placing a copy of said document in an envelope, individually addressed as follows:

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Each envelope was then sealed and deposited in the United States Mail at Salt Lake City, Utah, air mail postage thereon fully prepaid.

All parties required to be served have been served.

E. J. SKEEN

Subscribed and sworn to before me at Salt Lake City, Utah, this 30th day of November, 1970.

R. C. SKEEN
Notary Public